BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

THOMAS TOMLIN	)	
Claimant	)	
	)	
VS.	)	Docket No. 256,091
	)	
	)	
SUPERIOR INDUSTRIES INTERNATIONAL	)	
Self-Insured Respondent	)	

ORDER

Claimant requested review of the June 12, 2003 Award entered by Administrative Law Judge (ALJ) Jon L. Frobish. The Appeals Board (Board) heard oral argument on December 9, 2003.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Troy A. Unruh, of Pittsburg, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At the regular hearing, the ALJ reviewed the respondent's admissions taken at the prehearing settlement conference. During that proceeding, respondent admitted the compensability of claimant's wrist injury. That admission was further affirmed at the regular hearing when respondent's counsel conceded it was only the "nature and extent" of claimant's impairment that was at issue.[1] Thus, although respondent seems to argue that it is not responsible for the medical treatment to claimant's wrist, the Board finds, as did the ALJ, that compensability of the wrist injury is not at issue. Rather, it is the nature and extent of claimant's permanent impairment to that area of the body and whether claimant also suffered permanent impairment to his low back and hip area that remain to be determined.

ISSUES

The ALJ found claimant sustained a compensable accident while in respondent's employ on August 24, 1999, thereby injuring his right wrist. He awarded claimant medical

[1] R.H. Trans. at 6.

treatment, but specifically found that claimant had failed to establish any additional permanent impairment to the wrist beyond that which preexisted his work-related injury. The ALJ further concluded claimant was terminated for his failure to call in or report to work and as such, was not entitled to any temporary total disability benefits for the period he was off work recovering from surgery. Thus, other than an award for future medical benefits and the unauthorized medical allowance, the ALJ found claimant was entitled to no further benefits under the Kansas Workers Compensation Act, K.S.A. 44-501 et seq.

The claimant alleges the ALJ erred in not awarding temporary total disability benefits as well as additional functional impairment to claimant's wrist for the repeat fusion following his accident as well as impairment to his low back, thus recognizing claimant's resulting complaints from the bone harvesting procedure. Claimant further contends the ALJ erred in not awarding work disability benefits as he has returned to work for another employer at a lower rate of pay.

Respondent maintains the ALJ's Award should be affirmed as to both the issues of the nature and extent of claimant's permanency and the entitlement to temporary total disability benefits. Alternatively, respondent asserts that it is entitled to reimbursement of the monies spent in medical treatment, as the medical treatment provided was due to a preexisting condition rather than the August 24, 1999 accident. Respondent argues that the medical evidence establishes the hardware installed in claimant's wrist would have failed regardless of claimant's work activities. Thus, respondent bears no responsibility for the benefits voluntarily provided and should therefore be reimbursed. As explained before, the compensability of the wrist was admitted at the prehearing settlement conference and therefore, this argument is deemed to be waived.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant has an undisputed history of a right wrist injury dating back to 1984. At that time claimant's wrist was surgically stabilized but his difficulties continued. According to claimant, he did not have any pain or numbness but never really achieved a full range of motion in his wrist following this first procedure. In 1986 or 1987, the wrist was fused in an attempt to minimize his ongoing complaints. That procedure did not prove successful and in 1992 another fusion was attempted, this time with the aid of a bone graft which used bone taken from the claimant's iliac crest. Unfortunately, that effort failed and further procedures were required. In 1998, claimant had another fusion with the aid of a compression plate.

On August 24, 1999, while performing his normal work duties, claimant felt a sudden and distinct onset of pain in his right wrist while lifting a wheel. He was referred to Dr. John

M. Veitch, an orthopaedic surgeon, for treatment and was evaluated on September 1, 1999. As of that visit, claimant's complaints were pain and swelling along with prominence of the plate within the subcutaneous tissue in his wrist. Dr. Veitch had an MRI and bone scan performed and concluded claimant was suffering from a non-union in his wrist. He then recommended another fusion of the wrist.

Dr. Veitch testified that claimant's nonunion predated the claimant's employment with respondent.[2] Although he concedes that a previously fractured but subsequently fused wrist can break with traumatic injury, he indicated that the non-sharp and marginated surfaces in the area of the gap in claimant's wrist, as evidenced by the test results, are indicative of a failed union rather than of a new acute injury to the fusion site.[3]

Claimant was then seen by Dr. Edward B. Toby, who also diagnosed a failed union.[4] Like Dr. Veitch, Dr. Toby also recommended, and was ultimately authorized to perform, a repeat fusion with the installation of a plate and a bone graft from claimant's left ilium. In harvesting the bone, Dr. Toby performed a transverse incision on claimant's back, approximately 6 inches long to the side of his spine. After 5-6 weeks, Dr. Toby noted that claimant was progressing well and had no back complaints. He eventually released claimant with no restrictions but admits claimant is left with range of motion limitations in his wrist due to the fusion.

Dr. Toby assigned a 30 percent permanent partial impairment to the right upper extremity under the principles set forth in the *Guides.*[5] Dr. Toby indicated that this 30 percent does not represent an increase from claimant's preexisting impairment. Put simply, Dr. Toby believes that claimant's impairment has not increased despite of his work related accident and the subsequent surgical procedure.[6] He indicated the plate installed in claimant's wrist before he began his employment with respondent would have failed regardless of his employment activities.[7] However, he conceded that at least by claimant's history, it was the work event that led to the ultimate failure of the hardware and the acute onset of physical complaints.[8]

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[2] Veitch Depo. at 12.

[3] *Id.* at 14-15.

[4] Toby Depo. at 9.

[5] *Id.,* Ex. 5*;* American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

[6] Toby Depo., Ex. 5.

[7] *Id.* at 19.

[8] *Id.* at 44-45.

Claimant's counsel has suggested that because Dr. Toby did not see claimant before the most recent accident nor some of his medical records, his opinions should be disregarded. Yet, when Dr. Toby's testimony is taken as a whole, it is clear that he performed an examination and used the information gleaned from that effort in coming to his conclusion that claimant's wrist had never fused, even before the industrial accident. In any event, none of the testifying physicians in this claim had the benefit of seeing claimant before the accident at issue occurred. Thus, such criticism is of limited value.

In addition, Dr. Toby assigned no impairment for the surgical scar or the graft because claimant had voiced no back complaints as of the June 23, 2000 examination. Claimant's counsel suggests, without any specific reference to the record, that Dr. Toby assigned an additional 5 percent to the whole body for the surgical procedure to harvest the bone for the grafting process. In fact, all Dr. Toby did was concede that a 5 percent *could* be assessed if the patient was appropriately symptomatic.[9] Here, claimant had no such complaints at the time he was released from Dr. Toby's care.

For an undetermined period of time claimant was kept on a restricted duty job, but at some point, according to claimant, he was told by Keith Coonrod, respondent's human resources director, he could not return to work until he had "two good hands".[10] Claimant then testified that when he returned to work after receiving a release from Dr. Toby, he was unceremoniously escorted off respondent's premises by security guards and advised he was terminated for attendance issues. This apparently happened after claimant was released by Dr. Toby and attempted to return to work.

This version of the claimant's separation was contested, as Mr. Coonrod denies security was ever called in connection with claimant or any other employee during his tenure in respondent's employ. Rather, the security personnel are assigned exclusively to the parking areas for the purpose of limiting access to the respondent's plant. According to Coonrod, these officers were not and are not called to address security issues within the plant.

Mr. Coonrod testified claimant last worked on September 16, 1999. He indicated that claimant had failed to call in or appear for work for seven consecutive days and as a result, was terminated. He admitted that as far as he knew, there was no letter directed to claimant advising him of his termination. He also confirms that no offer of accommodated duty has been made since that time, although Mr. Coonrod maintains it is respondent's policy to accommodate workers who have been injured while working.

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[9] *Id*. at 37.

[10] R.H. Trans. at 18.

Claimant has returned to work for another employer and the only evidence offered indicates claimant is presently earning $435.91 per week, including fringe benefits.[11]

In May 2000, at his counsel's request, claimant was evaluated by Dr. Edward J. Prostic, a board certified orthopaedic surgeon. Dr. Prostic identified the non-union as well as claimant's complaints of pain in his right wrist. He also noted claimant reported symptoms in his left hip posteriorly. There is no notation of an altered gait in Dr. Prostic's notes. Dr. Prostic assigned a 20 percent functional impairment to the whole body as a result of the work-related injury. This included a 2 percent whole body rating for residual soreness and cutaneous nerve damage from the bone graft incision. Dr. Prostic was not asked about whether claimant had any preexisting impairment.

The ALJ appointed Dr. Terrence Pratt, a board certified physiatrist, to conduct an independent medical examination and offer an opinion as to claimant's impairment. Dr. Pratt saw claimant on three separate occasions and had the benefit of claimant's past medical records. Included within these records was a reference to chronic low back pain dating back 10 years.[12] Following his examination, he issued a report indicating claimant bears a 30 percent permanent impairment to the right upper extremity pursuant to the *Guides*. Of that 30 percent, 25 percent preexisted the work-related event, leaving an additional 5 percent permanent impairment from this accident. Dr. Pratt further testified that he would assess a 2 percent impairment to the whole body for the low back discomfort expressed by claimant. However, Dr. Pratt expressly testified that these back complaints bore no relationship to the wrist injury.[13]

After reviewing this evidence, the ALJ was unpersuaded by claimant's complaints of back pain. The ALJ reasoned "[t]he Claimant has made numerous complaints concerning his 'back'. These include a limp, pain radiating into his leg, an inability to sit for long periods of time, etc. . . . The claims made by the Claimant may relate to some problem he is having with his back, but they are not complaints normally associated with any cutaneous nerve damage."[14] He went on to agree with Dr. Toby's opinion and declined to award any impairment to claimant's back for the bone harvest procedure.

The ALJ then turned to the remaining injury to claimant's wrist. The ALJ acknowledged the previous 34 percent assigned in 1985 and when compared to the 30 percent assigned for the instant claim, the ALJ found "there has been no increase in his

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[11] Tomlin Depo. at 17.

[12] Pratt Depo. at 8, Ex. 1 at 2.

[13] Pratt Depo. at 19-20.

[14] ALJ Award (June 12, 2003) at 3.

[claimant's] impairment, the [c]laimant would not be entitled to any compensation".[15] This 34 percent apparently was information conveyed to Dr. Pratt in advance of the independent medical examination. While claimant acknowledges a prior workers compensation settlement arising out of his injury that occurred sometime in the mid-1980's, there is no evidence within the record to indicate precisely what particular standards the rating was based upon.

The Workers Compensation Act provides that awards should be reduced by the amount of preexisting functional impairment when the later injury aggravates a preexisting condition. The Act reads:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. **Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.**[16] (Emphasis added.)

And functional impairment is defined by K.S.A. 1999 Supp. 44-510e, as follows:

> **Functional impairment means** the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body **as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides** to the Evaluation of Permanent Impairment, if the impairment is contained therein. (Emphasis added.)

Consequently, for the date of accident in question the Act requires that before an award may be reduced for a preexisting functional impairment, the worker must have a functional impairment that is ratable under the AMA *Guides* (4th ed.), if the impairment is contained in those *Guides*. Moreover, the Act requires that the amount of the functional impairment be established by competent medical evidence.

However, the Act does not require that the preexisting functional impairment be evaluated by a doctor or that it be rated before the later work-related accident occurred, nor does the Act require that the worker be been given work restrictions for the preexisting condition before the later work-related accident occurred. Nonetheless, the Act does require that the preexisting condition have actually constituted a functional impairment.

The Kansas Court of Appeals has recognized that previous settlement agreements and previous functional impairment ratings are not necessarily determinative of a worker's

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[15] *Id*. at 4.

[16] K.S.A. 1999 Supp. 44-501(c).

functional impairment for purposes of the K.S.A. 44-501(c) reduction. In *Mattucci*,[17] the Kansas Court of Appeals stated:

> Hobby Lobby erroneously relies on *Baxter v. L.T. Walls Const. Co.*, 241 Kan. 588, 738 P.2d 445 (1987), and *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d 39, 611 P.2d 173 (1980), to support its position. In attempting to distinguish the facts of the present case, Hobby Lobby ignores that both *Baxter* and *Hampton* instruct that a previous disability rating should not affect the right to a subsequent award for permanent disability. *Baxter v. L.T. Walls Const. Co.*, 241 Kan. at 593; *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d at 41. Furthermore, the *Hampton [sic]* court declared that "settlement agreements regarding a claimant's percentage of disability control only the rights and liabilities of the parties at the time of that settlement. The rating for a prior disability does not establish the degree of disability at the time of the second injury." 241 Kan. at 593.

The Board has reviewed the evidence contained within the record and finds the ALJ's Award should be modified. While Dr. Toby expressed an opinion that claimant's permanency had not increased as a result of the August 29, 1999 accident, the Board is persuaded by the opinions expressed by Dr. Pratt, the independent medical examiner. He not only opined about claimant's present condition and impairment, but to his preexisting impairment as well, all within the appropriate edition of the Guides. The figure of 34 percent simply has no touchstone upon which the Board can, with confidence, rely as a basis for determining preexisting impairment. Thus, the opinions of Dr. Pratt are hereby adopted and claimant is found to have sustained a 5 percent additional impairment to his right upper extremity.

Similarly, the Board adopts Dr. Pratt's opinion with regard to the claimant's back and surgical site. Dr. Pratt found that claimant's back complaints were long standing in nature and not related to his wrist injury and the subsequent surgical procedure to harvest bone. Based on the evidence contained within the record, Dr. Pratt's findings are the most persuasive. Thus, claimant is entitled to no permanency for his back complaints.

Finally, claimant alleges he is entitled to temporary total disability benefits from the last date he worked up to the time he was released to return to work by Dr. Toby in July 2000. After reviewing the record, the Board concludes claimant has failed to prove he is entitled to benefits for the requested period. "The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."[18] The record is clear that respondent was providing accommodated duty to claimant but for whatever reason, he failed to call or

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[17] *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals unpublished opinion June 9, 2000)(Copy attached pursuant to Sup. Ct. Rule 7.04).

[18] K.S.A. 1999 Supp. 44-501(a)

appear for work for as much as 7 days. The ALJ's decision to deny temporary total disability benefits is affirmed as claimant failed to meet his burden of proof.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated June 12, 2003, is modified as follows:

The claimant is entitled to an award of 10 weeks permanent partial disability compensation, at the rate of $383.00 per week, in the amount of $3,830.00 for a 5 percent loss of use of the forearm, making a total award of $3,830.00.

All other findings, conclusions and orders contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this _____ day of May, 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Troy A. Unruh, Attorney for Self-Insured Respondent
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director